

AUG 24 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ISMAEL GUTIERREZ-VALENCIA,

Defendant - Appellant.

No. 05-30352

D.C. No. CR-05-02013-LRS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Submitted August 21, 2006**

Before: GOODWIN, REINHARDT, and BEA, Circuit Judges.

Ismael Gutierrez-Valencia appeals from the 46-month sentence imposed following his guilty plea to being a deported alien found in the United States, in

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Gutierrez-Valencia contends that the district court erred by increasing his sentence pursuant to 8 U.S.C. § 1326(b)(2) based on judge-found facts that he did not admit and a jury did not find beyond a reasonable doubt. He further asserts that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), still requires facts to be submitted to a jury and proven beyond a reasonable doubt. He also contends that in light of subsequent Supreme Court decisions, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), has been overruled and that § 1326(b) is unconstitutional.

These contentions are foreclosed with respect to prior convictions. *See United States v. Velasquez-Reyes*, 427 F.3d 1227, 1229 (9th Cir. 2005) (rejecting the contention that the government is required to plead prior convictions in the indictment and prove them beyond a reasonable doubt to a jury unless the defendant admits the prior conviction in his guilty plea); *see also United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006) (reaffirming the validity of *Almendarez-Torres* and rejecting a challenge to the constitutionality of § 1326(b)).

Gutierrez-Valencia also contends that following *Blakely v. Washington*, 542 U.S. 296 (2004), the maximum penalty in a mandatory state sentencing guideline system is the applicable maximum state guideline range, and so his prior state

conviction does not qualify as a felony under the Guidelines because the maximum state guideline sentence was under 12 months. As Gutierrez-Valencia concedes, this contention is foreclosed by *United States v. Murillo*, 422 F.3d 1152, 1155 (9th Cir. 2005).

Gutierrez-Valencia further contends that his sentence is unreasonable because of the sentencing disparity between a non-fast-track jurisdiction and a fast-track jurisdiction. This contention is foreclosed by *United States v. Marcial-Santiago*, 447 F.3d 715, 719 (9th Cir. 2006).

AFFIRMED.